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May 6, 2009

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**Re: SOAH Docket No. 582-08-2863; TCEQ Docket No. 2008-0093-UCR; Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority; (1589.00; 4.1)**

Dear Clerks:

Enclosed is Bee Cave's Brief in Opposition of Request for Answers to Certified Questions for filing in the above referenced matter. Seven copies are provided to the Chief Clerk and 3 copies are provided to the Docketing Division.

By copy of this letter and according to the certificate of service, all parties of record have been served.

Sincerely,

Jim Mathews
Attorney for City of Bee Cave

JM/ndh
Enclosure

**SOAH DOCKET NO. 582-08-1700**
**TCEQ DOCKET NO. 2008-0091-UCR**

| | | |
|---|---|---|
| **PETITION OF RATEPAYERS** | § | **BEFORE THE STATE OFFICE** |
| **APPEALING RATES ESTABLISHED** | § | |
| **BY CLEAR BROOK CITY** | § | **OF** |
| **MUNICIPAL UTILITY DISTRICT** | § | |
| | § | **ADMINISTRATIVE HEARINGS** |

**SOAH DOCKET NO. 582-08-2863**
**TCEQ DOCKET NO. 2008-0093-UCR**

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|---|---|---|
| **APPEAL OF THE RETAIL WATER** | § | **BEFORE THE STATE OFFICE** |
| **AND WASTEWATER** | § | |
| **RATES OF THE** | § | **OF** |
| **LOWER COLORADO RIVER** | § | |
| **AUTHORITY** | § | **ADMINISTRATIVE HEARINGS** |

**SOAH DOCKET NO. 582-09-1168**
**TCEQ DOCKET NO. 2008-1645-UCR**

| | | |
|---|---|---|
| **PETITION OF WEST TRAVIS** | § | **BEFORE THE STATE OFFICE** |
| **COUNTY MUNICIPAL** | § | |
| **UTILITY DISTRICT NO. 3** | § | **OF** |
| **FOR REVIEW OF** | § | |
| **RAW WATER RATES** | § | **ADMINISTRATIVE HEARINGS** |

## BEE CAVE'S BRIEF IN OPPOSITION TO REQUEST FOR ANSWERS TO CERTIFIED QUESTIONS

The City of Bee Cave is a petitioner in TCEQ Docket No. 2008-0093-UCR (*Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority)*. Bee Cave files this brief in opposition to the ALJs' request for answers to certified questions. Bee Cave's brief does not address the merits of the individual questions because Bee Cave assumes that a round of briefs on the merits will be ordered if the Commission decides to hear the requests.

### I. SUMMARY

The Commission should decline the ALJs' request for answers to the certified questions because no response is necessary and because this is not the appropriate forum for addressing what could be a significant shift in the law applying to, potentially, millions of Texans. No response is necessary because the rulings in each of the three matters appear to be correct within

the context of each case and the rulings are not inconsistent with each other. Any potential error in a particular ruling can be addressed through the hearing process or through the PFD in that case. Additionally, this is not the appropriate forum for addressing this issue because the potential change in the law that could result from the answers change the expectations of millions of district customers statewide. These other customers should be given notice and the opportunity to comment on the Commission's possible action through a process such as rulemaking.

## II. BACKGROUND

Texas Water Code §49.2122 was enacted in 2007 as an amendment to Senate Bill 3, the omnibus water legislation for the 80th legislative session. The caption of HB 2301 indicated that it was to be an act "relating to the authority of certain special districts to establish *differences in rates between customer classes.*"

The bill analysis prepared for consideration of HB 2301 by the House Natural Resources Committee provided as follows:

> Currently, the water rate structure is unfairly different for *apartment complexes versus single family residences.* The fair establishment of water rates ensures that all the district's customers pay an equitable share of the expenses for the services provided by the district.
>
> HB 2301 would *allow a district to establish different fees among classes of customer* based on any factors the district considers appropriate.

Although HB 2301 was reported favorably without amendment from the House Natural Resources Committee to the Local and Consent Calendar, it was not considered on the House floor.[1] Instead, Representative Talton offered the language of HB 2301 as an amendment to Senate Bill 3, the omnibus water legislation passed during the 80th legislative session. Floor consideration on Representative Talton's amendment was brief, to the point, and clear:

> SPEAKER: Following the amendment to the amendment, Clerk will read the amendment.
>
> CLERK: Amendment to the amendment by Talton.
>
> TALTON: Thank you Mr. Speaker. Members, this *just allows the districts*, the water districts *to do classes for*

[1] See Texas Legislature Online, 80th Regular Session, HB 2301-Actions.

*billing rates*. I believe it's acceptable to the author. Move adoption.

SPEAKER: Members, Mr. Talton sends up an amendment to the amendment. The amendment is accepted by the author. Is there objection? The chair hears none. The amendment in adopted.[2]

The bill became effective on September 1, 2007.[3]

On August 22, 2007, which was before the effective date of Section 49.2122, LCRA adopted rate increases for both water and wastewater utility services applicable to all customer classes in its West Travis County Regional System. Bee Cave appealed LCRA's water rates pursuant to Tex. Water Code §13.043(b). West Travis County MUDs 3 & 5 appealed both the water and wastewater rates implemented by LCRA pursuant to Tex. Water Code §13.043(b). Bee Cave does not challenge LCRA's customer classifications within its West Travis County Regional System or the allocation of costs among the those customer classes. Instead, Bee Cave challenges LCRA's revenue requirements and the reasonableness of its rates. Bee Cave believes that LCRA's costs are unreasonably excessive for the service provided.

Bee Cave filed its appeal on December 28, 2007. In May 2008, the Commission referred the appeal to SOAH and scheduled a preliminary hearing for August 19, 2008. At the preliminary hearing, the parties agreed to postpone setting a procedural schedule to allow for settlement discussions to occur. On September 16, 2008, another agreement was reached by the parties further extending the period for settlement discussions and to postpone the filing of a procedural schedule. Settlement discussions continued into the beginning of 2009. On October 1, 2008, LCRA's rates for the West Travis County Regional System automatically increased by more than 20%[4] under the terms of LCRA's tariff.

Finally, more than a year after the petition was filed, LCRA filed a letter with the ALJ on February 9, 2009, first raising the issue of the application of Texas Water Code §49.2122. On March 26, 2009, the ALJ ruled that §49.2122 does not apply to this matter. On April 9, 2009, the ALJ denied LCRA's motion for reconsideration and entered a procedural schedule. This ruling allowed Bee Cave to begin discovery to examine the reasonableness of LCRA's revenue

[2] See Texas Legislature Online, 80th Regular Session, Video Broadcast: House Chamber, May 22, 2007, from 3:49:28 – 3:50:03.
[3] Given that the LCRA Board set these rates in August 2007, before the effective date of the statute, Bee Cave may have an argument that the Section 49.2122 does not even apply to this rate action. Bee Cave will brief this issue if the Commission decides to hear the certified questions.
[4] LCRA FY 2009 Business Plan at 26.

requirements. On April 20, 2009, the Executive Director filed a request for certified question and motion to abate, which was granted by the ALJ on April 29, 2009, cutting off Bee Cave's ability to conduct discovery. On October 1, 2009, LCRA's rate will increase again automatically, this time by more than 25%.[5]

## III. ARGUMENT AND AUTHORITIES

### A. No response is needed to the certified questions because no conflict exists

The Commission should decline the ALJs' request for answers to certified questions because no clarification of a rule or policy is needed within the factual context of the three underlying contested case proceedings. Each of the three cases is factually unique, and Texas Water Code §49.2122 (Section 49.2122) applies to each of the cases in a unique manner. Based on the facts of each of these matters, each respective ALJ's decision is consistent with each of the other decisions. With no conflict between the orders, there is no need for clarification of Commission policy.

The three cases are factually unique. The case in which Bee Cave[6] is involved is the appeal of LCRA's retail water and wastewater rates for LCRA's West Travis County Regional System, which were set by LCRA's Board in August 2007. This appeal was filed by the ratepayers in these systems, including Bee Cave and its ratepayer/citizens, who tendered the requisite number of petitions for appeal with the Commission. The petitioners in the case assert that LCRA's revenue requirements for the systems are excessive -- neither just nor reasonable. The petitioners are not asserting that the rates established by LCRA within the various classes served by these systems (*i.e.*, residential, commercial, etc.) are unreasonably discriminatory. Petitioners assert that Section 49.2122 does not apply to the case because the petitioners are not challenging the establishment of any rate classification or allocation of costs among different classes in the systems. Judge Card agreed with the petitioners, ruling that Texas Water Code Section 49.2122 only applies to the establishment of customer classes and not to the broader issue of whether LCRA, like any other utility subject to a rate challenge, bore the burden of proof that its rates are just and reasonable.

[5] *Id.*
[6] TCEQ Docket No 2008-0093-UCR.

The second case[7] involves a contract between West Travis County MUD No. 3 and LCRA. This contract allows the LCRA Board to change the rates during the contract term. After LCRA raised the rate applicable to the contract, the MUD filed a petition under Texas Water Code §12.013 and §11.036. These statutory provisions expressly grant the Commission the authority to fix just and reasonable rates for the furnishing of raw water. In that case, Judge Qualtrough ruled that Section 291.12 of the Commission's rules placed the burden of proof on the MUD. This ruling was based solely on the fact that LCRA was not acting as a retail water provider. This holding does not raise a question regarding the scope of Section 49.2122, because it is not based on Section 49.2122. Moreover, the holding is not in conflict with Judge Card's ruling in Bee Cave's case.

The third case[8] involves the appeal of water rates set by the Clear Brook MUD for apartments. In that case, the single petitioner is only asserting that the MUD's apartment rate is unreasonably preferential and discriminatory when compared to the MUD's residential rates.[9] The petitioner is not alleging that the MUD's revenue requirements were unjust and unreasonable. Essentially, the petitioner claims that the MUD should not have created a separate class for apartments because the service is indistinguishable from the service provided to residential customers. In that case, Judge Newchurch ruled that Section 49.2122 applied and that the petitioner has the burden of proving that the creation of the separate rate class for apartments was arbitrary and capricious. Judge Newchurch's ruling is not surprising since the legislative history behind Section 49.2122 reveals that the claim brought by the petitioner is exactly the type of claim that Section 49.2122 was enacted to address.[10] Judge Newchurch's ruling is not in conflict with either Judge Card's or Judge Qualtrough's rulings because they are all based on different factual and legal circumstances.

This brief summary of the three cases shows that each of the cases is based on different facts and different law. These differences are sufficient to support the different results reached by each ALJ. Because there is no conflict between the cases, there is no important policy issue that the Commission needs to resolve through the certification process. Each of these cases can work through the hearing process. If any party believes that Section 49.2122 dictates a specific

[7] TCEQ Docket No. 2008-1645-UCR.
[8] TCEQ Docket No. 2008-0091-UCR.
[9] TCR Highland Meadow Limited Partnership's Third Amended Petition for Review ¶ 22 at 8 (March 5, 2009).
[10] The author of the bill stated that the legislation was filed to address an issue raised in a lawsuit involving Clear Brook MUD and the petitioner, and Clear Brook MUD was the only witness on the bill at the committee hearing.

result within the context of the facts of the case, the party can raise that in closing arguments or in exceptions to the PFD. Moreover, with a fully developed factual record, the ALJ's will be in a better position to determine whether the actions of the districts were arbitrary and capricious.

**B. This is not the appropriate forum to establish such far-reaching policy**

The Commission should decline the ALJ's requests for answers to certified questions because the resolution of such far-reaching policy matters should be made in a rulemaking proceeding in which all potentially affected parties, who are numerous and reside throughout the state, will have an opportunity to comment on the Commission's action after receiving notice.

An affirmative response to Question No. 2 would dramatically change the law regarding the review of district set rates. The repercussions of this change would affect retail water and sewer customers in every district in the state, and every wholesale purchaser of water or services from districts. There are well over 1,000 districts covered by Section 49.2122, providing services to millions of people.[11] These customers, who previously could force a district to prove that its charges were just and reasonable if they could obtain petitions from more than ten percent of affected customers, could now face the almost impossible additional hurdle of having to prove that the district acted arbitrarily and capriciously in setting the rates. Traditionally, the burden has been placed on the utility to show that its rates are just and reasonable because only the utility has the detailed information (costs, customers, asset values) needed to establish a rate. No individual customer or group of customers will ever have the resources needed to review the district's cost data (which the district is not required to maintain in any accessible form), especially not for a district of the size and complexity of LCRA.

The effect of an affirmative response to Question No. 2, moreover, would not be limited to water and wastewater rates. Such a change would also apply to electric, and electric transmission rates, and could affect the jurisdiction of the Public Utilities Commission. LCRA, as a district, sells electricity on a wholesale basis and provides wholesale electric transmission service throughout the state. LCRA, as a river authority, is under the original jurisdiction of the PUC.[12] The "charges, fees, rentals or deposits" addressed by Section 49.2122 are not limited to

[11] LCRA alone provides water and sewer services, including wholesale services, to more than 650,000 people. When electric services are considered, LCRA provides wholesale transmission service to all of the ERCOT service area, including more than 22 million retail electric customers.

[12] PURA defines "electric utility" to include river authorities. Tex. Util. Code §31.002(6). As an electric utility, LCRA is subject to the PUC's original jurisdiction. Tex. Util. Code §32.001.

water and sewer charges. Question No. 2 also is not limited on its face to water and sewer rates. If Section 49.2122 applies to a district's water rates, it must also apply to a district's electric, and electric transmission rates. The PUC appears to be unaware that Section 49.2122 applies to river authorities because the PUC has not adopted rules implementing Section 49.2122. The Commission should ensure that Section 49.2122 is applied consistently by the two agencies – otherwise, one set of customers (water and sewer) could eventually subsidize another set of customers.

This proceeding does not offer an adequate opportunity for potentially affected parties to comment on the Commission's proposed action, given the potential magnitude of the change in the law that could result from the Commission's answer to Question No. 2. Such a proposed change should be subject to review and comment from all potentially affected parties, which could only be accomplished through rulemaking. Such a proceeding would allow both districts and customers (and other affected agencies) to address these issues in a meaningful manner before the Commission.

The Executive Director may argue that additional rulemaking is not needed because the Commission adopted rules implementing Section 49.2122 in July 2008,[13] and that this question merely seeks an interpretation of those rules. Those rules, however, gave no indication that the change in law would dramatically change the ability of ratepayers to challenge district rates. The text of the rule parrots the statutory language, and the preamble states that the rule merely allows the district to establish different charges, fees, rentals or deposits.[14] No party commented for or against the amendment. Bee Cave asserts that the notice and reasoned justification provisions of the Commission's adoption of the rule were not sufficient if this rulemaking was broad enough to encompass a change in the law as broad as what would occur from an affirmative response to Question No. 2.

## IV. CONCLUSION/PRAYER

For the reasons set out herein, Bee Cave respectfully asks that the Commission decline the ALJs' requests for answer to the certified questions. No answers are needed at this time because no conflict exists between the pending cases, and any error within a particular case can be addressed in the usual course of a contested case.

[13] 33 Tex. Reg. 5327 (July 4, 2008), amending 30 TAC §291.41.
[14] 33 Tex. Reg. at 5329.

If the Commission decides to provide a response to the certified questions, Bee Cave requests that the Commission establish an expedited briefing schedule to allow the parties to file briefs and replies addressing the substance of the individual questions. The ratepayers in LCRA's West Travis County Regional System have been patiently waiting for the opportunity to determine whether LCRA's revenue requirements are unreasonable, and if so, to have a hearing to prove this fact. LCRA benefits from further delay in resolution of this matter, particularly given that its rates will automatically jump by 25% in October. Bee Cave hopes that the Commission will bear that in mind in setting a schedule.

Respectfully submitted,

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By: _____
Jim Mathews

**ATTORNEY FOR CITY OF BEE CAVE**

## CERTIFICATE OF SERVICE

This is to certify that the undersigned sent a true and correct copy of the foregoing *Bee Cave's Brief in Opposition to Request for Answers to Certified Questions* in accordance with the applicable agency rules, as noted below, on this 6th day of May 2009 to the following parties:

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**Reference:** SOAH Docket No. 582-08-2863; TCEQ Docket No. 2008-0093-UCR; Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority; ***Bee Cave's Brief in Opposition to Request for Answers to Certified Questions;*** **(1589.00; 4.1)**

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